UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
AT COLUMBUS

Garey E. Lindsay, Regional Director of the Ninth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD	)	
Petitioner	)	
v.	)	Civil Action No.
SHAMROCK CARTAGE, INC.	)	
respondent	)	

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR INJUNCTIVE RELIEF PURSUANT TO SECTION 10(J) OF THE NATIONAL LABOR RELATIONS ACT

I. STATEMENT OF THE CASE**:**

A. Before the Court:

Pending before the Court is a petition initiated pursuant to Section 10(j) of the National Labor Relations Act, as amended. Section 10(j) of the Act authorizes the National Labor Relations Board, herein called the Board or petitioner, to seek from the appropriate federal district court interim injunctive relief to preserve the status quo pending Board prosecution of unfair labor practices. [1]/ Petitioner seeks injunctive relief in this proceeding to restrain Shamrock Cartage, Inc. (respondent) from engaging in conduct violative of Sections 8(a)(1), (3), and (4) of the Act. Specifically, injunctive relief is requested to enjoin respondent from:

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[1]/ Section 10(j) (29 U.S.C. Section 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(a) Threatening employees with more onerous working conditions because of the Union's lawful bargaining positions;

(b) Disciplining or discharging employees for their protected Union support, Union activity, participation in Board proceedings, or other activity protected by Section 7 of the National Labor Relations Act; and

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

In addition, petitioner seeks an affirmative order directing respondent, pending final disposition of the administrative process, to:

(a) On an interim basis, within five (5) days from the date of the District Court's Order, offer Shane Smith, in writing, immediate reinstatement to his former position, or, only if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed and displacing, if necessary, any person who has been hired or reassigned to replace him;

(b) On an interim basis, within five (5) days from the date of the Order, rescind the suspension of Smith from April 9 to April 12, 2018, and inform Smith that it has done so;

(c) Within seven (7) days from the date of the District Court's Order, post copies of the Order at all locations in respondent's facility where notices to employees are customarily posted and maintain such notices free from all obstructions or defacements pending conclusion of the Board's administrative proceeding;

(d) Within ten (10) days from the date of the District Court's Order: (i) Hold one or more mandatory employee meetings on work time at times when respondent customarily holds employee meetings and scheduled to ensure the widest possible employee attendance, at which the Court's order will be read to the bargaining unit employees by a responsible management representative of respondent in the presence of a Board agent and the Union, or, at respondent's option, by a Board agent in the presence of a responsible management official; (ii) Announce such meetings in the same manner it would customarily announce a meeting of employees; (iii) Require that all unit employees attend such a meeting; and;

(e) Within twenty (20) days of the issuance of this Order, file with the District Court and serve a copy upon the Regional Director of Region 9 of the Board, a sworn affidavit from a responsible official which describes with specificity how respondent has complied with the terms of this decree, including the exact locations where respondent has posted the Order.

B. Jurisdiction of the Court:

At all material times, respondent has been an Illinois corporation with an operation in Columbus, Ohio and has been engaged in the performance of truck spotting and hostler services. As such, respondent's operations are located within the judicial district over which this Court exercises jurisdiction. Respondent's alleged unlawful conduct creates a serious potential for irreparable harm to employees' organizational rights which a Board order, in due course, cannot adequately remedy. Absent interim relief, respondent's continuing unlawful conduct will effectively thwart respondent's employees' efforts to exercise their lawfully protected rights to seek union representation.

C. Before the Board:

After a complete administrative investigation of an unfair labor practice charge and amended charge, during which all parties were afforded an opportunity to participate fully, the petitioner determined that there was reasonable cause to believe that respondent violated Section 8(a)(1), (3) and (4) of the Act as alleged and issued an amended complaint on September 12, 2018, which alleges that respondent has engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (4) of the Act. (Attached to the Petition for Injunctive Relief as Exhibit 3) A hearing is scheduled to be held on November 5, 2018, before an administrative law judge of the Board. The Board's own regulatory process prospectively provides relief requiring respondent to cease and desist from engaging in unlawful activity and to, *inter alia*, reinstate the employee who was unlawfully discharged. However, the process is lengthy. Accordingly, petitioner seeks injunctive relief pursuant to Section 10(j) of the Act, 29 U.S.C. § 160(j), during the pendency of the Board's proceedings.

II. SUMMATION OF UNDERLYING FACTS:

Respondent prepares trucks and trailers for shipment at two logistics facilities in Ohio. One location is a Kraft Foods warehouse at a DHL facility in Groveport, Ohio, while the other is a Pepsi warehouse at a Ryder Logistics facility in Obetz, Ohio. (Respondent's May 22, 2018 Position Statement, hereinafter referred to as Exhibit A, pp. 2-3). The Union, International Brotherhood of Teamsters Local Union No. 413, represents a unit of approximately 12 yard workers at both facilities.

On April 10, 2017, Shane Smith began working for respondent at the Kraft warehouse. (Ex. A, p. 3.) Later that year, in the summer and fall, Smith was the main supporter of a campaign by the Union to organize respondent's yard workers. (Affidavit of Shane Smith, signed on May 7, 2018, hereinafter referred to as Exhibit B, p. 2.) On August 7, 2017, the Union petitioned for an election. The next day, respondent terminated Smith. (Ex. A, p. 2.) Respondent's site supervisor, Jason Caccamo, resisted carrying out respondent's decision, opining to respondent's owners that it was illegal. (Affidavit of Jason Caccamo, signed on May 21, 2018, hereinafter referred to as Exhibit C, p. 6.) But Caccamo ultimately acquiesced after the owners threatened to terminate him if he did not follow instructions. (Id.) Shortly thereafter, on August 10, 2017, the Union filed a charge alleging that Smith's termination was discriminatory. (NLRB Charge Against Employer, Case 09-CA-204232, hereinafter referred to as Exhibit D.) Around that same time, the Union filed additional charges in connection with the organizing campaign.

In November 2017, the parties stipulated to setting aside the election and entered into an informal settlement agreement resolving the Union's charges. Pursuant to the settlement, respondent agreed to, among other things, reinstate Smith at the Kraft warehouse, recognize the

Union, and conduct a notice reading. (November 8, 2017 Informal Settlement Agreement, hereinafter referred to as Exhibit E.)

After Smith was reinstated, he became the shop steward and joined the Union's bargaining committee, which began negotiating with respondent for a first contract. (Ex. B, pp. 2-3.) Meanwhile, respondent's owners instructed Caccamo to watch Smith "like a hawk" and terminate him if he did anything wrong. (Ex. C, p. 7.)

On April 5, during bargaining for a first contract, respondent proposed an interim disciplinary policy, but withdrew it after the Union conditioned acceptance on addition of a just-cause provision. (Affidavit of Ted Beardsley, signed on May 29, 2018, hereinafter referred to as Exhibit F, pp. 1-2.) Four days later, on April 9, Smith had a discussion with Caccamo's successor, Brian Williamson, about new employees who had had attendance issues and on-site accidents. (Ex. B, pp. 3-4.) During the discussion, Williamson told Smith that he would put problematic workers on Smith's shift because the Union had not agreed to respondent's progressive discipline proposal. (Id.) In the same conversation, Williamson mentioned to Smith that respondent intended to temporarily keep around a new hire who had had an on-site accident damaging the warehouse and 7-8 no-show/no-calls because respondent was short-handed. (Id.)

Around noon on April 9, Smith discussed with Williamson a problem Smith had been having with his truck. (Id.) Employees at the Kraft warehouse use DHL trucks to position trailers. Each truck is equipped with a computer system that shows drivers where to position the trailers. These computer systems frequently freeze up, sometimes requiring the intervention of the vendor responsible for the computers, PINC. (Ex. B, p. 4; Ex. C, p. 2.) Smith's computer had been malfunctioning for about a week or more leading up to April 9. (Ex. B, p. 4.)

When Smith told Williamson about his computer problem, Williamson gave Smith permission to contact PINC and explained the trouble-shooting process. (Id.) Smith called PINC on his lunch break, using a tech-support number displayed on the truck computers. (Ex. B, p. 5.) While on the phone, Smith inquired about the status of service for a computer on a different truck that had been down for a couple months. (Ex. B, p. 6.) A PINC representative told Smith that Williamson and DHL had told him a week earlier that they were waiting for action by Kraft, which was ultimately responsible for paying PINC. (Id.) Smith suggested that PINC ask Williamson and DHL for Kraft's contact information so PINC could contact Kraft directly. (Id.) The conversation ended shortly after and Smith returned to work. (Id.)

Around 5 p.m., Williamson told Smith that he was "suspended pending investigation leading to termination." (Id.) Smith asked Williamson for the reason several times, and Williamson eventually explained that he and a DHL representative had received an updated email with an invoice, which Williamson forwarded to the owners. (Ex. B, pp. 6-7.) According to Williamson, they deliberated and eventually told Williamson to tell Smith to leave. (Id.) Smith agreed to do so, and told Williamson that he would contact the Union, win his job back with back pay, and he would see Williamson when he got back. (Id.)

Around the same date, Williamson called Caccamo to talk about the incident involving Smith's phone call to PINC. Williamson said he wanted to tell Caccamo about their "superstar" and explained how Smith made a phone call to PINC that resulted in an email from PINC to Kraft and DHL. (Ex. C, p. 4-5.) Williamson said he was concerned he would get in trouble, so he forwarded the email to corporate. (Id.) Because of Smith's history with respondent, Williamson added, corporate was unhappy any time Smith's name is mentioned, and that Smith was suspended and would be terminated. (Id.)

On April 11, Smith and the Union's business agent met with respondent's negotiator Michael Holmes and its attorney Jim Allen to discuss Smith's discipline. (Ex. A, p. 5.) Smith recounted his April 9 contact with PINC, and respondent's representatives indicated that Williamson denied giving Smith permission to contact PINC. (Ex. B, p. 7-8.) Holmes and Allen also shared that they had received orders from the owners before coming into the meeting to proceed with termination and that the matter was out of their hands. (Ex. F, p. 4.) On that same evening, April 11, at 7:00 p.m., and again on the following morning, April 12, at 7:00 a.m., respondent read aloud to employees the NLRB notice in the informal settlement agreement concerning Smith's prior unlawful termination. (Ex. E; Ex. F, p. 5.)

On April 12, Holmes notified the Union by email that respondent determined that Smith would be terminated effective immediately. Respondent notified Smith of his termination on April 13. (Ex. B, p. 9.)

Respondent maintains a progressive disciplinary policy. (Section 3.4 of Respondent's Employee Handbook, hereinafter referred to as Exhibit G.) While respondent asserted in its position statement that there were other issues predating his suspension and discharge, those issues were not documented as disciplinary actions and only offered as post-hoc rationalization. Respondent presented no evidence of prior disciplinary actions against Smith that were relied on when he was discharged. Respondent presented no evidence that it maintains a policy prohibiting drivers from contacting PINC. In fact, before his resignation, former site supervisor Caccamo routinely permitted his drivers to deal directly with PINC to trouble-shoot issues, which Caccamo indicated was PINC's preference. (Ex. C, p. 3.) Respondent asserts that Smith's conduct was the first time the issue of a driver contacting PINC has arisen. (Respondent's undated letter to Petitioner, hereinafter referred to as Exhibit H.) There is no evidence that

Smith's contact with PINC generated any costs for respondent, DHL, or Kraft, or that it created any problems for respondent's relationships with DHL and Kraft.

There has been significant turnover since the organizing campaign. At most, four of the twelve employees who were employed in September 2017, the month of the election, are still in the unit. The Union and Employer continue to negotiate for a first contract. As of late August 2018, the parties had not yet begun discussing economic terms.

III. THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT:

Section 10(j) of the Act authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See, *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 970 (6th Cir. 2001); *Levine v. C & W Mining Co., Inc.*, 610 F.2d 432, 436-437 (6th Cir. 1979), quoting S. Rep. No. 105, 80th Cong., 1st Sess., 27 (1947), reprinted in I Legislative History of the Labor Management Relations Act of 1947 433 (Government Printing Office 1985). Accord: *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 28-29 (6th Cir. 1988). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. See, *Kobell v. United Paperworkers Intern.*, 965 F.2d 1401, 1406 (6th Cir. 1992).

To resolve a Section 10(j) petition, a district court in the Sixth Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." See, e.g., *Ahearn v. Jackson Hospital*

Corp., 351 F.3d 226, 234 (6th Cir. 2003); *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d at 969; *Gottfried v. Frankel*, 818 F.2d 485, 493 (6th Cir. 1987). See also, *Glasser v. ADT Security Systems, Inc.*, 188 LRRM 2805, 2807, 2010 WL 2196084, at *2 (6th Cir. 2010).

A. The "Reasonable Cause" Standard:

The Regional Director bears a "relatively insubstantial" burden in establishing "reasonable cause." *Ahearn v. Jackson Hospital*, 351 F.3d at 237. In determining whether there is reasonable cause to believe that the Act has been violated, a district court may not decide the merits of the case. Id.; see also, *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d at 969; *Gottfried v. Frankel*, 818 F.2d at 493. Instead, the Regional Director's burden in proving "reasonable cause" is "relatively insubstantial." See, *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d at 969; *Kobell v. United Paperworkers Intern.*, 965 F.2d at 1406; *Levine v. C & W Mining Co., Inc.*, 610 F.2d at 435. In light of, "the Board's expertise in matters of labor relations, [the court] must be 'hospitable' to the General Counsel's view of the law" in 10(j) proceedings. See, *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 287 (7th Cir. 2001). Thus, the district court must accept the Regional Director's legal theory as long as it is "substantial and not frivolous." *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d at 29; *Kobell v. United Paperworkers Intern.*, 965 F.2d at 1407. Factually, the Regional Director need only "produce some evidence in support of the petition." *Kobell v. United Paperworkers Intern.*, 965 F.2d at 1407. The district court should not resolve conflicts in the evidence or issues of credibility of witnesses, but should accept the Regional Director's version of events as long as facts exist which could support the Board's theory of liability. See, *Ahearn v. Jackson Hospital*, 351 F.3d at 237; *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d at 969; *Gottfried v. Frankel*, 818 F.2d at 493, 494.

B. The "Just and Proper" Standard:

Injunctive relief is "just and proper" under Section 10(j) where it is "necessary to return the parties to the status quo pending the Board's processes in order to protect the Board's remedial powers under the NLRA." *Kobell v. United Paperworkers International Union, et al.*, 965 F.2d at 1410, quoting *Gottfried v. Frankel*, 818 F.2d at 495. [2]/ Accord: *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d at 970. Thus, "[i]nterim relief is warranted whenever the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified or the administrative procedures will be rendered meaningless." *Sheeran v. American Commercial Lines, Inc,*, 683 F.2d 970, 979 (6th Cir. 1982), quoting *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967). Accord: *Fleischut v. Nixon Detroit Diesel, Inc*., 859 F.2d at 30-31.

IV. APPLICATION OF THE STANDARDS TO THIS CASE:

A. There is Reasonable Cause to Believe that respondent Violated the Act by suspending and discharging Shane Smith.

There is strong cause to believe that respondent violated Section 8(a)(1), (3), and (4) as alleged in the complaint. respondent violated Section 8(a)(3) and (4) by suspending and discharging shop steward and bargaining committee member Shane Smith because of his Union activity and participation in Board proceedings. [3]/ Initially, Smith's protected activity and Responden's knowledge thereof—including knowledge of Smith's participation in the processing of Board charges as a named discriminatee—are beyond dispute.

[2]/ The "status quo" referred to in *Gottfried v. Frankel* is that which existed before the charged unfair labor practices took place. See *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d at 30 n. 3.

[3] *See, e.g.*, *FiveCAP, Inc.*, 332 NLRB 943, 945 (2000) (employer violated Section 8(a)(3) and (4) by constructively discharging employee for union activities and testimony in Board proceedings), *enforced in relevant part*, 294 F.3d 768 (6th Cir. 2002).

The evidence also establishes that respondent's animus against Smith's protected activity was a motivating factor in Smith's suspension and discharge. Respondent's statements to former site supervisor Jason Caccamo demonstrate the respondent's unlawful motivation: Shortly after Smith's November 2017 reinstatement, respondent's owners instructed then-supervisor Caccamo to watch Smith "like a hawk" and discharge him if he did anything wrong. (Ex. C, p. 7.) The timing of that statement indicates that respondent desired to be rid of Smith because of his Union activity and participation in Board proceedings that resulted in Smith's reinstatement and respondent's recognition of the Union. The subsequent passage of five months—during which Smith was active as a steward and bargaining committee member—did nothing to alleviate respondent's animus. As Williamson indicated to Caccamo, corporate was unhappy every time Smith's name was mentioned because of Smith's history with respondent. (Ex. C, p. 5.)

The timing of Respondent's decision to terminate Smith also supports an inference of unlawful motivation.[4] Respondent suspended Smith just days after the Union's bargaining committee resisted respondent's proposal of an interim disciplinary. Williamson's April 9 threats about assigning "bad workers" to Smith's shift indicates that respondent was holding Smith at least partly responsible for the Union's position at the bargaining table. (Ex. B, p. 4.) The timing is even more suspicious given that the decision to suspend and terminate Smith fell during during the two-day period when respondent's officials were scheduled to read the notice as agreed in the parties' informal settlement agreement. (Ex. E.)

Also supporting an inference of unlawful motivation are the circumstances of Smith's suspension and discharge. Although respondent asserts that it decided to discharge Smith on April 12, the evidence indicates that respondent's owners decided to terminate Smith on April 9,

[4] *See Kentucky Gen., Inc. v. NLRB*, 177 F.3d 430, 436-37 (6th Cir. 1999) (short time lapse between employees' union activity and layoff, as well as employer awareness of employees' union activity, bolsters finding that layoffs were discriminatorily motivated).

within a few hours of learning that he had contacted PINC. A little over three hours after Smith's call to PINC, Williamson told Smith that Smith was "suspended pending investigation leading to termination." (Ex. B, p. 6.) During respondent's April 11 meeting with the Union about Smith's discipline, respondent's representatives Michael Holmes and Jim Allen made clear that respondent was committed to termination, even though they also purported to be investigating Smith's conduct. (Ex. F, p. 5: "[Respondent's attorney] said we were instructed to take this as far as it goes.") Thus, respondent's owners immediately seized upon an opportunity for discipline to rid themselves of Smith without first investigating.[5]

Although the owners' discovery of Smith's contact with PINC prompted the owners to suspend and discharge Smith, the evidence shows that the incident was not the real reason for the discipline. Respondent maintained no policy proscribing Smith's conduct, and there is no evidence that it harmed respondent in any way. To the contrary, the evidence indicates that Smith acted in the respondent's interests by attempting not only to trouble-shoot his own truck's computer system, but also inquire about another truck's computer that had been down for months.[6] Moreover, site supervisor Williamson had given Smith permission to contact PINC. (Ex. B, pp. 4-5.) Further, respondent maintained a progressive disciplinary policy, Smith had no disciplinary record at the time of his suspension, and respondent decided to terminate him shortly after it decided to retain a new employee with 7-8 no-show/no-calls and an on-site accident because it was short-handed. (Ex. B, p. 3.) Rather than being a serious offense justifying

[5] *See NLRB v. Advance Transp. Co.*, 979 F.2d 569, 574 (7th Cir. 1992) (employer's failure to conduct more than perfunctory investigation of employee's alleged misconduct supported inference that antiunion animus was motivating factor in discharge).

[6] Although Williamson around April 11 told Caccamo that respondent felt Smith was possibly interfering with the contract with Kraft, respondent made no assertion to that effect to the Region.

immediate removal from respondent's workforce, Smith's conduct was a pretext for an unlawfully motivated suspension and discharge.[7]

Respondent argues that Smith's query to PINC "had the direct effect of creating a purchase order" of $ 3,279.93. (Ex. A, p. 15.) In support, respondent relies on a customer quote in that amount created by PINC. (Ex. A, Employer's Exhibit 4, p. 24.) However, the quote is dated February 15, 2018, more than two months before Smith's call. And, there is no evidence that Smith's call resulted in any costs to respondent, DHL, or Kraft. Respondent's misplaced reliance on the February purchase order is, at best, indicative of respondent's perfunctory investigation of Smith's conduct, performed to mask its unlawful motive.[8]

Along similar lines, respondent argues that the April 9 occurrence was not the first time Smith called PINC without permission. (Ex. A p. 4.) In support, respondent submitted an email from PINC to Williamson that said, "Driver Shane called in on another request, but asked about this quote." (Ex. A, Employer's Exhibit 3, p. 22.) The email text is consistent with the evidence showing that Smith spoke to PINC about two issues during a single phone call. It fails to support respondent's assertion of previous contact between Smith and PINC, which Smith denies.

Respondent claims that it decided to terminate Smith on April 12 after determining that Smith was dishonest about his contact with PINC. Specifically, it asserts that during the April 11 meeting with Holmes and Allen, Smith falsely claimed he had permission to call PINC; falsely claimed he would not have been able to make the call without being given the number by Williamson, even though PINC's support number is displayed inside respondent's trucks; and

[7] *See, e.g., W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995) (discriminatory motive may be established by, among other things, an employer's "disparate treatment of certain employees compared to other employees with similar work record or offenses" and "a company's deviation from past practices in implementing the discharge"); *Talsol Corp.*, 155 F.3d at 797 (unlawful motive established in part by lack of firm policy to discharge employees for reason employer relied on).

[8] *See NLRB v. Dillon Stores*, 643 F.2d 687, 692 (10th Cir. 1981) ("a flimsy or unsupported explanation may affirmatively suggest that respondent has seized upon a pretext to mask an anti-union motivation").

revealed that he called PINC again after respondent suspended him. However, as explained below, the evidence makes clear that this is a post-hoc explanation that respondent did not, in fact, rely upon, and instead further supports an inference of unlawful motivation.

First, as discussed above, the evidence indicates that respondent decided to terminate Smith before Smith made any representations to respondent about his conduct on April 9. Second, respondent did not tell Smith it was discharging him due to his alleged dishonesty, but first raised this rationale in its position statement to the Region.[9] Third, respondent's contentions that Smith was dishonest are, at best, further flawed products of a perfunctory investigation. The only evidence that Smith lacked Williamson's permission is a self-serving written statement by Williamson, and Smith did not contend that he relied on Williamson simply to tell him PINC's phone number, but, rather, explained that he relied on Williamson to teach him the entire phone trouble-shooting process. Accordingly, respondent has failed to establish that Smith was dishonest or that it relied on a good-faith belief to that effect in discharging him.

In its position statement, respondent invokes several instances of earlier alleged misconduct by Smith. However, there is no evidence that respondent relied on the alleged misconduct in suspending and discharging Smith. In any event, none of respondent allegations of misconduct have merit. First, respondent contends that when Williamson suspended Smith, Smith told Williamson while leaving, "You ratted me out! I will be back with pay and when I am back you're done!" (Ex. A, p. 4.) While Smith testified that he said he would win his job back with back pay and see Williamson when he got back, Smith denies that he told Williamson he would be "done" or otherwise threatened Williamson, and there is no reason to discredit Smith's testimony. (Affidavit of Shane Smith, signed on June 27, 2018, hereinafter referred to as Exhibit

[9] *See NLRB v. Lakepark Indus., Inc.*, 919 F.2d 42, 45 (6th Cir. 1990) (employer's provision of shifting reasons for discharge indicated unlawful motive); *Abbey's Transp. Servs. v. NLRB*, 837 F.2d 575 (2d Cir. 1988) ("shifting assertions strengthen the inference that the true reason was for union activity").

I, p. 2.) Second, respondent alleges that Smith previously threatened another employee after his first termination in August 2017. In that regard, respondent relies on a police report, written "for documentation only" in October 2017, asserting that an employee reported that on August 8, 2017, Smith told the employee, after his termination, that when he got his job back he would pull her out of her truck. (Ex. A, p. 5.) Smith denies making such a statement, and there is no reason to discredit the denial. (Ex. I, pp. 2-3.)

Respondent also claims that Smith has misled employees in the past. It alleges that around March 14, Smith told an employee he would not be getting lunch on a particular day because he was taking too long to do his job. It also alleges that Smith induced a new employee to quit around March 21 by telling him he needed to buy a smartphone to work for respondent, and that if he did not buy the phone, he would not be driving in certain trucks and would have his daily duties dictated to him. (Ex. A, p. 5, Employer Exhibits 6 and 7, pp. 26-27.) However, respondent imposed no discipline after these alleged events occurred and has not argued that it relied on Smith's alleged misleading of employees to suspend and discharge him.

Finally, respondent argues that Smith's contacting PINC was not protected concerted activity. That is beside the point, as the evidence indicates that Smith's contacting PINC was only a pretext for respondent to rid itself of the most active Union supporter in the bargaining unit.

B. Interim injunctive relief is just and proper to preserve the employees' statutory rights and to preserve the efficacy of the Board's final order.

Congress has declared that "encouraging … collective bargaining" is the "policy of the United States."[10] Section 7 of the Act grants employees the right "to bargain collectively through

[10] 29 U.S.C. § 151.

representatives of their own choosing."[11] Without timely interim relief, respondent's illegal actions will irreparably harm the national policy encouraging collective bargaining, the employees' right to union representation, and the Board's remedial power. In short, respondent will forever benefit from its illegal conduct.

respondent's conduct threatens to undermine the collective bargaining process by extinguishing employee support for the Union. Employee support is vital to a union's ability to bargain effectively.[12] Without it, the union has no leverage and is "hard-pressed to secure improvements in wages and benefits at the bargaining table."[13] And, many courts, including the Sixth Circuit, have recognized that discrimination against employees for union activity predictably chills that support and interferes with collective bargaining.[14] Immediately, the terminations remove union supporters from the workplace and the bargaining unit.[15] Moreover, the remaining employees, especially those who were not union activists, will often refrain from

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[11] *Id.* § 157.

[12] *See* Asseo v. Centro Medico del Turabo, Inc., 900 F.2d 445, 454 (1st Cir. 1990) (recognizing that erosion of employee support jeopardizes union's ability to represent employees); *accord Chester v.* Grane Healthcare Co., 666 F.3d 87, 102-03 (3d Cir. 2011); Frye v. Specialty Envelope, Inc., 10 F.3d 1221, 1226-27 (6th Cir. 1993); NLRB v. Electro-Voice, Inc., 83 F.3d 1559, 1573 (7th Cir. 1996); *Small v.* Avanti Health Sys., LLC, 661 F.3d 1180, 1193 (9th Cir. 2011); I.U.E. v. NLRB, 426 F.2d 1243, 1249 (D.C. Cir. 1970).

[13] Moore-Duncan v. Horizon House Developmental Servs., 155 F. Supp. 2d 390, 396 (E.D. Pa. 2001); *see also* Duffy Tool & Stamping, L.L.C. v. NLRB, 233 F.3d 995, 998 (7th Cir. 2000) ("By undermining support for the union, respondent positions himself to stiffen his demands … knowing that if the process breaks down the union may be unable to muster enough votes to call a strike.").

[14] *See* Ahearn v. Jackson Hosp. Corp., 351 F.3d 226, 239 (6th Cir. 2003); Pye v. Excel Case Ready, 238 F.3d 69, 74-75 (1st Cir. 2001); Kaynard v. Palby Lingerie, Inc., 625 F.2d 1047, 1053 (2d Cir. 1980); Pascarell v. Vibra Screw Inc., 904 F.2d 874, 880 (3d Cir. 1990); Electro-Voice, 83 F.3d at 1572-73; Aguayo v. Tomco Carburetor Co., 853 F.2d 744, 749 (9th Cir. 1988); Sharp v. Webco Indus., Inc., 225 F.3d 1130, 1135 (10th Cir. 2000); *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 373-74 (11th Cir. 1992); *Lund v. Case Farms Processing, Inc.*, 794 F. Supp. 2d 809, 822-23 (N.D. Ohio 2011).

[15] *See* Eisenberg v. Wellington Hall Nursing Home, Inc., 651 F.2d 902, 907 (3d Cir. 1981) (exclusion of union supporters from bargaining process during pendency of administrative proceedings would likely undermine union's position); Electro-Voice, 83 F.3d at 1573 (union organizers' "absence deprives the employees of the leadership they once enjoyed"); Gottfried v. Frankel, 818 F.2d 485, 489, 495-96 (6th Cir. 1987) (discharged chief steward played important role in developing union support); *Pascarell*, 904 F.2d at 880 (discharged bargaining committee members were "only cohesive group" in bargaining unit); *Arlook*, 952 F.2d at 370 (discharged employees included "lodestars of the initial organizational efforts").

supporting the union for fear of also losing their jobs.[16] Even a single discharge may chill union support and weaken a union's bargaining position.[17] Because of the predictable adverse effects of discriminatory discharges on the bargaining process, multiple Courts of Appeals have endorsed inferences of irreparable harm based on the discharges themselves.[18] The risk of irreparable harm is particularly acute where, as here, a newly established union is attempting to bargain for a first contract.[19]

Although this case involves just one discriminatory discharge, that discharge has an outsize impact. Respondent's removal of Smith from the workplace has already altered the bargaining process to respondent's advantage. Smith, as steward, effectively served as the other employees' primary contact with the Union. Since Smith's removal from the workplace, most employees are now cut off from their main source of information about the status of bargaining.

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[16] *See* Pascarell, 904 F.2d at 880-81 (discrimination chilled collective activity by employees, especially non-activist employees, through clear message that they will be disciplined if they associate with union); *Pye*, 238 F.3d at 74 ("discharge of active and open union supporters ... risks a serious adverse impact on employee interest in unionization"); *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 576 (2d Cir. 1988) ("Employees are certain to be discouraged from supporting a union if they reasonably believe it will cost them their jobs."); *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212-13 (2d Cir. 1980) (discharge of union adherents may reasonably "remain in [employees'] memories for a long period"); *Electro-Voice*, 83 F.3d at 1573 ("[T]he employees remaining at the plant know what happened to the terminated employees, and fear that it will happen to them.").

[17] *See, e.g.*, *Schaub v. W. Mich. Plumbing & Heating, Inc.*, 250 F.3d 962, 971 (6th Cir. 2001) (without reinstatement of single employee organizer, "there would be no one at the company organizing for the union"); *Frankl v. HTH Corp. (Frankl II)*, 693 F.3d 1051, 1060, 1066 (9th Cir. 2012) (single discharge of "key participant" in union organizing and bargaining likely to cause irreparable harm); *Silverman v. JRL Food Corp.*, 196 F.3d 334, 338 (2d Cir. 1999) (ordering reinstatement of single discriminatee); *Centro Medico*, 900 F.2d at 454 (ordering instatement of chief union organizer whom successor employer discriminatorily refused to hire); *Overstreet v. Shamrock Foods Co.*, 2016 WL 8505125, at *6 (D. Ariz. Feb. 1, 2016), *affirmed*, 679 F. App'x 561 (9th Cir. 2017); *NLRB v. Ona Corp.*, 605 F. Supp. 874, 886 (N.D. Ala. 1985).

[18] *See Ahearn*, 351 F.3d at 239 ("multiple terminations of striking employees directly following the end of the union strike would have an inherently chilling effect on other employees"); *Frankl v. HTH Corp. (Frankl I)*, 650 F.3d 1334, 1363 (9th Cir. 2011) ("likelihood of success" in proving discriminatory discharge of union activists during contract negotiations "largely establishes" likely irreparable harm, absent unusual circumstances); *cf. Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967) (independent evidence of irreparable harm not required because illegal discharges during an organizing campaign "operate predictably to destroy or severely inhibit employee interest in union representation, and activity toward that end"); *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 297-98 (7th Cir. 2001) (interim instatement of employees illegally refused hire just and proper even where "the Director chose not to make an independent case on irreparable harm").

[19] *See Arlook*, 952 F.2d at 373 (bargaining units are "highly susceptible to management misconduct" where union was recently certified and employees are bargaining for first contract); *accord Pascarell*, 904 F.2d at 880-81; *Ahearn*, 351 F.3d at 239; *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 500-01 (7th Cir. 2008).

Thus, by removing Smith from the workplace, respondent has effectively isolated the bargaining unit from the Union and thereby weakened the Union's bargaining position.

The Union's ability to bargain effectively will irreparably diminish unless Smith is immediately reinstated. "[I]n the labor field, as in few others, time is crucially important in obtaining relief."[20] A final Board reinstatement order cannot restore the lawful status quo because it will not come until years after the discharge[21]—too late to erase the effect on the bargaining process.[22] By that time, Smith will likely have taken another job and be unavailable for reinstatement, rendering successful respondent's effort to remove him from its workforce.[23] But even if Smith ultimately accepts reinstatement, other employees wishing to actively support the Union will have seen that a worker who "attempted to exercise rights protected by the Act had been discharged" and waited for "years to have his rights vindicated."[24] Both the remaining employees and Smith will reasonably view the Union as ineffective in protecting them,[25] especially since the Union has yet to achieve a contract.[26] At that point, no worker "in his right mind" will support the Union.[27]

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[20] *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430 (1967).
[21] *See, e.g.*, *Lineback v. Irving Ready-Mix, Inc.*, 653 F.3d 566, 570 (7th Cir. 2011) (noting the "notoriously glacial" pace of Board proceedings).
[22] *See Pascarell*, 904 F.2d at 881 ("Employees will not risk the uncertainty and hardship attendant upon even temporary lay-off if that is the price they must pay for union activity."); *Electro-Voice*, 83 F.3d at 1573 ("As time passes, … the spark to organize is extinguished."); *Pye*, 238 F.3d at 75 (unremedied interference with unionization effort "would make the Board's remedial process ineffective simply because it is not immediate").
[23] *See Pye*, 238 F.3d at 75; *accord Electro-Voice*, 83 F.3d at 1573; *Aguayo*, 853 F.2d at 749. *See generally* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1792-93 (1983) (studies show significant decline in proportion of discriminatees accepting reinstatement when offered more than six months after discriminatory act), cited with approval in *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1094 n.32 (3d Cir. 1984).
[24] *Silverman v. Whittal & Shon, Inc.*, 125 LRRM 2150, 1986 WL 15735, at *1 (S.D.N.Y. 1986).
[25] *See Asseo v. Bultman Enterprises, Inc.*, 913 F. Supp. 89, 97 (D.P.R. 1995) ("Even those who remain willing to accept employment may be inclined to withdraw their support of the Union because of its inability to adequately represent their interests …."); *cf. NLRB v. Hardesty Co.*, 308 F.3d 859, 865 (8th Cir. 2002) (employer's unilateral changes to working conditions will "often send the message to the employees that their union is ineffectual, impotent and unable to represent them").
[26] *See* cases cited *supra* n.19.
[27] *Whittal & Shon*, 1986 WL 15735, at *1.

Meanwhile, the high rate of employee turnover makes Smith's reinstatement even more critical. The Union needs Smith back in the workplace to enable it to build relationships with and obtain the support of newly hired employees. The bargaining unit's continued isolation from the Union in Smith's absence will further erode employee support for the Union. Thus, the Union will not have the support it needs to bargain effectively,[28] and may ultimately be ousted by disaffected employees or forced to disclaim representation.[29] Absent timely reinstatement of Smith to return the Union to a more effective bargaining position, respondent is likely to succeed in permanently frustrating the employees' statutory right to Union representation. The Board's order will be an "empty formality."[30]

Immediate interim reinstatement of Smith offers the best chance of avoiding this unjust result.[31] Despite respondent's egregious conduct, the Union still enjoys some support among the employees. Because fear of retaliation, and the absence of Smith's pro-Union leadership, may completely extinguish employee support for the Union by the time a Board order issues, interim reinstatement is necessary now to erase the chill and impact on bargaining before it is too late to prevent remedial failure.[32] It will mitigate the chilling effect on employees and avoid disaffection by sending an affirmative signal that the Union, the Board, and the courts will *timely*

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[28] *See* cases cited *supra* n.12.

[29] *See Frye*, 10 F.3d at 1226-27 ("employee support would erode to such an extent that the Union could no longer represent those employees," rendering a final Board remedy "ineffective") (quoting *Centro Medico*, 900 F.2d at 454); *Asseo v. Pan Am. Grain Co., Inc.*, 805 F.2d 23, 27 (1st Cir. 1986) ("Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining.").

[30] *Angle*, 382 F.2d at 660.

[31] *See id.* at 661 (interim reinstatement is "best visible means" of rectifying chill of protected activity).

[32] *See Pye*, 238 F.3d at 75 (interim reinstatement of five employee organizers held just and proper); *Pascarell*, 904 F.2d at 878, 881-82 (six active union members); *Eisenberg*, 651 F.2d at 905-07 (five negotiating committee members and three other active union supporters) *Ahearn*, 351 F.3d at 230-31, 239 (three union activists); *Gottfried v. Frankel*, 818 F.2d at 490, 495-96 (chief steward and other union members); *Schaub*, 250 F.3d at 971 (one employee organizer); *Sharp*, 225 F.3d at 1135 (six union supporters); *Frankl II*, 693 F.3d at 1060, 1066 (one key union activist); *Aguayo*, 853 F.2d at 746, 749 (eleven members of organizing committee); *Angle*, 382 F.2d at 660-61 (four employee organizers); *Arlook*, 952 F.2d at 370, 373-74 (nine union activists); *Whittal & Shon*, 1986 WL 15735, *1 (six union activists).

protect employees if they face retaliation for supporting the Union.[33] Smith has stated that he would accept reinstatement under the protection of an injunction. His interim reinstatement will preserve and restore the support and leadership necessary for effective bargaining.[34]

The other requested relief is also just and proper. A cease-and-desist order is "a standard part of a [Section] 10(j) preliminary injunction."[35] Reading of the district court's order in front of the employees and a representative of the Board is an "effective but *moderate* way to let in a warming wind of information and, more important, reassurance."[36] Relatedly, posting the order during the pendency of the administrative proceedings will further inform and reassure employees of their rights.[37]

In sum, interim relief will vindicate the employees' statutory right to Union representation and preserve the Board's remedial power.[38] In addition, it will serve the public

[33] *See Pascarell*, 904 F.2d at 881 (interim reinstatement just and proper to counteract clear message that "if one is associated with the union, one will be disciplined"); *Arlook*, 952 F.2d at 374 (interim reinstatement just and proper to preserve "Board's ability to foster peaceful labor negotiations"); *cf. Pye*, 238 F.3d at 75 (interim reinstatement of union supporters terminated during organizing campaign appropriate to preserve "spark to unionize"); *Ona Corp.*, 605 F. Supp. at 886 (interim reinstatement of single discriminatee in large unit will send "affirmative signal").

[34] *See Moore-Duncan v. Aldworth Co.*, 124 F. Supp. 2d 268, 294 (D.N.J. 2000) (reinstatement "will allow unlawfully terminated employees to again become part of the bargaining process").

[35] *Paulsen v. PrimeFlight Aviation Servs., Inc.*, 718 F. App'x 42, 45 (2d Cir. 2017) (summary order); *see also, e.g.*, *Hooks v. Ozburn-Hessey Logistics, LLC*, 775 F. Supp. 2d 1029, 1052 (W.D. Tenn. 2011) (cease-and-desist order appropriate "to prevent irreparable chilling of support for the Union among employees and to protect the NLRB's remedial powers.").

[36] *United Nurses Assocs. of Cal. v. NLRB*, 871 F.3d 767, 788-89 (9th Cir. 2017) (emphasis in original); *see also Norelli v. HTH Corp.*, 699 F. Supp. 2d 1176, 1206-07 (D. Haw. 2010) (ordering reading of court order), *affirmed*, 650 F.3d 1334 (9th Cir. 2011); *Fernbach v. Sprain Brook Manor Rehab, LLC*, 91 F. Supp. 3d 531, 550 (S.D.N.Y. 2015); *Rubin v. Vista del Sol Health Services, Inc.*, 2015 WL 306292, at *2 (C.D. Cal. Jan. 22, 2015); *Overstreet v. One Call Locators Ltd.*, 46 F. Supp. 3d 918, 932 (D. Ariz. 2014); *Calatrello v. Gen. Die Casters, Inc.*, 190 LRRM 2157, 2011 WL 446685, at *8 (N.D. Ohio 2011); *Garcia v. Sacramento Coca-Cola Bottling Co.*, 733 F. Supp. 2d 1201, 1218 (E.D. Cal. 2010).

[37] *See, e.g.*, *Hooks*, 775 F. Supp. 2d at 1054 (ordering posting).

[38] Interim relief will pose little harm to respondent. It is well-settled that the Section 7 rights of discriminatees to interim reinstatement under Section 10(j) outweigh the job rights of their replacements. *See Aguayo*, 853 F.2d at 750. Moreover, respondent will receive Smith's experienced services and will retain its managerial right to impose lawful discipline. *See Eisenberg*, 651 F.2d at 906.

interest by effectuating the will of Congress and ensuring that respondent's unfair labor practices do not permanently succeed.[39]

V. CONCLUSION:

It is respectfully submitted that the jurisdiction of this Court has been properly sought and that the Court has the authority to grant the relief requested. For the foregoing reasons, it is submitted that the Court should grant the relief prayed for in the petition in order to implement the important public policy of protecting employees from suffering the irreparable loss of the benefits of good-faith collective bargaining. Accordingly, issuance of an interim remedial order is manifestly just and proper under the circumstances of this case.

Dated at Cincinnati, Ohio this 2nd day of October 2018.

/s/ Joseph F. Tansino

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[39] *See Pye*, 238 F.3d at 75 ("Section 10(j) interim relief is designed to prevent employers from using unfair labor practices in the short run to permanently destroy employee interest in collective bargaining."); *Frankl I*, 650 F.3d at 1365 ("In § 10(j) cases, the public interest is to ensure that an unfair labor practice will not succeed…."); *Pan Am. Grain Co.*, 805 F.2d at 28 ("[T]he public has an interest in ensuring that the purposes of the Act be furthered.").